No. 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE CEMENT INSTITUTE, *et al.*, AETNA PORTLAND CEMENT COMPANY, *et al.*, MARQUETTE CEMENT MANUFACTURING COMPANY, CALAVERAS CEMENT COMPANY, *et al.*, HURON PORTLAND CEMENT COMPANY, SUPERIOR PORTLAND CEMENT, INC., NORTHWESTERN PORTLAND CEMENT COMPANY, RIVERSIDE CEMENT COMPANY, a Corporation, UNIVERSAL ATLAS CEMENT COMPANY, CALIFORNIA PORTLAND CEMENT COMPANY, MONOLITH PORTLAND CEMENT COMPANY, *et al.*, BLAINE S. SMITH, *et al.*,

Respondents.

On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT, UNIVERSAL ATLAS CEMENT COMPANY

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Order of the Court Below

The order of the Circuit Court of Appeals setting aside the order of the Federal Trade Commission was entered October 31, 1946 (R. 16829).

Opinion Below

The opinion of the Circuit Court of Appeals (R. 16761) is reported in 157 F. 2d 533.

Statutes Involved

The statutes involved are Section 5 of the Federal Trade Commission Act and Section 2(a) and (b) of the Clayton Act. They are correctly quoted on pages 3-5 of the Petitioner's brief.

Questions Presented

Briefly stated, the questions presented by the Petition for Certiorari were:

1. Whether the evidence supports findings that the Respondents had conspired to restrict competition by the maintenance of a multiple basing point delivered price system.

2. Whether proof and findings that the Respondents acted collectively to prevent such practices as might in any respect impair Respondents' multiple basing point delivered price system, which the Petitioner called acts of implementation below, warranted the Commission in finding that the Respondents had agreed and combined to maintain said system.

3. Whether a reviewing court may, on the basis of its own independent appraisal of the evidence, reject the Commission's finding of combination.

4. Whether sales pursuant to a delivered price system under which Respondents respectively sell to differently located customers at varying mill net prices violate Section 2(a) of the Clayton Act.

5. Whether systematically meeting but never going below the delivered prices of competitors is a meeting

in "good faith" of the equally low price of a competitor within the meaning of Section 2(b) of said Act (Petition, pp. 2-3).

The third, fourth and fifth questions stated on pages 2-3 of the Petitioner's brief were not presented by its Petition for Certiorari and are not incidental to any of the questions so presented, and the second and third questions presented by the Petition as above are not even included in the questions now presented.

The Cease and Desist Order

The Commission's order entered July 17, 1943, directed the Cement Institute and seventy-four cement manufacturers, constituting as was found the entire cement industry of the country, to cease and desist from engaging in or continuing "any planned common course of action, understanding, agreement, combination, or conspiracy * * * to do or perform any of the following things":

1. "Quoting or selling cement at prices calculated or determined pursuant to or in accordance with the multiple basing point delivered price system; or quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement * * *."

2. Doing various acts "in connection with or in aid or support" of said system.

3. "Discriminating in price between or among their respective customers by systematically charging" what the Commission calls variable "mill net prices."

4. "Using any means substantially similar to those specifically set out in this order with the purpose or effect of accomplishing any of the things prohibited by this order" (R. 16133-7).

It will be observed that the order enjoins a conspiracy to do certain specific things and it will be found on analysis as will later appear that all are incidental to and depend-

ent upon a conspiracy to use a so-called "multiple basing point delivered price system." Indeed the Petitioner expressly so admits (Brief, pp. 121-2).

The order does not enjoin a conspiracy "to suppress competition in price and to sell cement under said" system, as the Petitioner repeatedly asserts in its brief. It only enjoins a conspiracy to use a particular pricing method, which the Commission says inevitably results in identical prices in each locality.

STATEMENT

The Issue Stated by the Examiner

This proceeding was instituted in 1937. After taking evidence over a period of three years, the Examiner filed a report at the conclusion of which he stated the respective contentions of the parties and the issue for decision by the Commission and the Courts thus:

> "The word 'competition' is used with various dissimilar meanings in the record, and respondents contend that the 'matching prices' or 'meeting competition,' as heretofore shown, is real competition and is effected and maintained by methods gradually evolved throughout many years, which methods do not require or involve any agreement, mutual understanding, or cooperative action between competitors. It is also contended that trade rivalry which manifests in differences of service is also price competition. The complainant contends that the system, methods, and trade conditions shown are such as could not be brought about by individual action or in the absence of some form of agreement, collusion, or conspiracy, and that the direct evidence also shows that they were not so brought about and employed. This raises the ultimate issue for the Commission and the courts, and the same is hereby and herewith respectfully submitted" (R. 15772).

The Examiner excluded evidence to prove that fair or excessively low cement prices had prevailed in the cement industry for many years (R. 14887). Even if the excluded evidence was not relevant to the question whether the concurrent use of the so-called multiple basing point system was inherently collusive and illegal *per se*, as contended by the Petitioner up to now, the Courts have always regarded such evidence of great probative value in determining by circumstantial evidence the existence or non-existence of a conspiracy to maintain artificial prices by any means or methods whatsoever.

The Petitioner asserts that "a necessary condition to this system of marketing is the setting of artificially high base prices" (Brief, p. 125).

The Examiner excluded the evidence tendered as irrelevant to the issue involved. It was certainly relevant and of great probative value on the issue whether there was an actual agreement or conspiracy to use said system, and its exclusion precludes the shift of ground which the Petitioner now attempts.

Findings of the Commission

After hearing the parties the Commission wrote 170 pages of involved and inconsistent findings of inferences and evidence (R. 15961-16132) on which it entered said cease and desist order.

Said findings were obviously intended to support its contention as stated by the Examiner. It nowhere found that any two or more of the Respondents had ever at any time agreed, combined or conspired to use said pricing system or method. It did not even find any agreement or conspiracy to sell at delivered prices or to use basing points to determine delivered prices.

But it did find that several different pricing methods were actually used in the cement industry, that some published "complete price lists showing the delivered prices at substantially all delivery points" (Finding 7(m), R.

16000), without stating how such prices were determined, and that "In particular locations at particular periods of time there have been arbitrary prices, including zone and area prices, and there have been instances where departures from the pricing formula have caused price differences * * *". (Finding 9(a), R. 16023).

Its findings also show at least two radically different pricing methods used by those who do use basing points, namely, that some—the evidence shows by far the greater number, the findings say half—have "base mills"—that is they determine their respective delivered prices by adding the actual cost of delivery to the price bases established at the mills from which shipments are made—and that others have "non-base" mills—that is they calculate their delivered prices from places other than those of actual shipment (Paragraphs 7(b)-(d), R. 15988-9), as was done by the Corn Products Company and the Staley Manufacturing Company in the so-called *Glucose* cases (324 U. S. 726, 746).

The Commission coined the phrase "multiple basing point delivered price system," but it nowhere defined it. However, it insisted below that "the essence of the basing point system" was the systematic calculation of delivered prices "from places other than those of actual shipment" (Brief below, p. 123).

Yet it nowhere found any agreement on basing points or what mills should be base or non-base, but it did find that "a base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill" (Finding 7(b), R. 15989).

It also found that except during N. I. R. A. (48 Stat. 195) and a brief period thereafter "there has been no systematic exchange among the corporate respondents of basing point prices or changes in such prices" (Finding 9(e), R. 16029).

The Heart of the Commission's Case

The Court of Appeals rightly said that the seventh finding was the heart of the Commission's case:

Paragraph 7(a) says that the Respondents use the formula "that the delivered price at any location shall be the lowest combination of base price plus all-rail freight" (R. 15988).

"Base price" is a term coined by the Petitioner for "price base," which is not a price at all but only an element of the price charged by the seller and paid by the buyer.

There is no finding of any agreement that the delivered price at any locality shall be the lowest combination of price base plus freight or that the Respondents will use any such formula, and of course there is no such formula.

The simple formula, which anyone desiring to determine a fair delivered price would naturally use, is A plus B equals X, or price base plus freight equals delivered price. The known terms being different at different basing points, the mere use of that formula cannot possibly result in identical delivered prices.

Finding 7(h) says that "excluding errors made in the application of this pricing formula, it is plain that it will inevitably result in identical delivered prices * * *. It is equally plain that this formula, once put into operation, is self-perpetuating in the sense that renewed understandings or agreements are not needed to maintain identical delivered prices * * *. This formula was not evolved and put into operation at one stroke. It came into existence and its territorial application was extended from time to time as a result of understandings and agreements among cement manufacturers" (R. 15991).

It did not find how that result came about, what the understandings were or when or between whom they were made.

It had found in Paragraph 6(a) (R. 15983-4) that cement manufacturers "have by understandings and agreements

developed and maintained substantial uniformity of action," that "some of the current practices of the industry * * * originated in agreements entered into as long as 20 to 30 years ago," that "other practices having similar origin have been modified or extended by collective action," that "some of the Respondents have been parties to substantially all of these activities; other Respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other Respondents have been mere followers" and that a few "have, from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action."

It did not find what the understandings or practices were or when, how, or between whom they occurred.

It did find that since the organization of the Institute there have been "instances where cement manufacturers have made concessions in price or terms of sale; from time to time numerous concessions have been made in particular areas; and in the depth of the economic depression in the early 1930s concessions were wide-spread" (Finding 6(c), R. 15987).

It both alleged and found that "a difference in price as small as one cent a barrel may divert business from one seller to another" (Complaint, Paragraph 8, R. 241, Finding 9(a), R. 16023). It found that it is a "recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized article sold to well-informed buyers," but that that principle did not apply to cement for the reason that cement "prices are not the result of market action in a true economic sense but merely expressions of a non-competitive or monopolistic price structure," whatever that may mean (Finding 22(c), R. 16123-4).

It made evidentiary findings which show that the use of delivered prices in the cement industry was the result of individual action and how the use of the simple formula,

price base plus freight equals delivered price, developed naturally over the years and was in general use in the cement industry prior to the organization of the Cement Manufacturers Protective Association in 1916, as this Court decided in *Cement Mfgrs. Prot. Assn.* v. *U. S.*, 268 U. S. 588.

Those findings show that when the manufacture of cement was confined in this country to the Lehigh Valley, cement was sold f.o.b. mill, but when the industry began to spread over the country at the beginning of the century, first one manufacturer and then another began to sell at delivered prices and that for a time there was "delivered price selling and f.o.b. mill selling side by side" (Finding 7(h), R. 15992).

The fact overwhelmingly established and indeed admitted that cement buyers generally preferred delivered prices (R. 11118) fully explains why delivered price selling became general in the cement industry.

The Commission failed to find and the Petitioner's brief ignores certain uncontested but decisive facts. They are:

This Respondent for many years has had a price base at each of its mills and customarily charges its customers the price base at the shipping mill plus actual freight without the inclusion of any so-called "phantom freight" in any delivered price (R. 1841, 4555, 10317).

The only important exceptions to this customary method of selling are:

(1) When Respondent finds a competitor selling at a particular destination at a lower price, it meets such lower price or abandons the effort to sell at such destination (R. 1841, 10317).

(2) In many large cities, Respondent sells to all buyers at the same price, although the cost of delivery to them may vary somewhat. Thus competitive buyers in the same city receive the same price (R. 4701-3, 10317-19).

(3) Respondent sometimes sells to the United States Government at a price f.o.b. Respondent's mill so that the Government can take title at the mill and ship the cement on low land grant freight rates available only to the Government (R. 10668-69, 10673-74, 14949, 1548, 1620).

Another fact of the greatest importance in this case established without contradiction in the record is that cement of various manufacturers is so much alike from the buyer's standpoint that buyers will not pay more in total costs at destination for one brand of cement than for another, as the Petitioner both alleged and found.

Prior to N. I. R. A. most Respondents, including Universal, did not belong to the Institute or participate in its activities. The Institute Code of Ethics never became operative and the Commission found that it was abandoned before Universal joined the Institute in 1933 (Finding 7(o), R. 16000).

The Organization of the Institute

The Institute was organized in August, 1929. The statement of its purposes in Articles of Association included the provisions: "to adopt and promulgate a code of ethics for the government of the members" and "to establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable."

The Commission inferred from that statement of purposes in the Articles that the multiple basing point system was one of the "customs and usages to be maintained." It found as above that the Code of Ethics adopted by the Institute remained in effect until the beginning of N. I. R. A.

Neither the Articles nor the Code said anything about said system. Pricing methods are not included in the term "trade customs and usages" as commonly under-

stood and there is no finding that the Institute ever decided that said system was one of the "customs and usages" to be maintained by it or that it was advisable for it to maintain said system.

The Decision of the Court of Appeals

For the first time in the Court of Appeals the Petitioner maintained that the conspiracy enjoined originated on the organization of the Institute in 1929, and that membership in the Institute was alone sufficient to charge the Respondents as parties to the conspiracy, although most of the present members joined it in 1933 in response to a campaign to make it representative of the industry to co-operate with the Government in the administration of N. I. R. A. (R. 16767-70).

In fact, the Institute was organized at the suggestion of the Chairman of the Commission to adopt a Code of Ethics and to seek a Trade Practice Conference (R. 10192-4) at the very time when the Commission became active in holding trade practice conferences (See Federal Trade Reg. Service, Vol. II 1930-1932, 102 C. C. H. ¶ 2500-1).

The rules of the Commission provide that the trade practice procedure has for its purpose the establishment of "trade practice rules" and "standards of ethical business."

> Rule 28, F. T. C. Rules of Practice, 16 CFR, Cum. Supp. § 2.28, as amended by 12 F. R. 5449.

A difference of opinion having arisen between the Commission and the Department of Justice as to policy, the proposed Trade Practice Conference was never held (R. 10195) and the Institute remained inactive until it was revived under N. I. R. A. as above.

The Commission found as above that there was a price war in the cement industry during the early 1930s.

The basic contention of the Petitioner in the Court of Appeals was that "The multiple basing point system con-

currently used by the respective corporate petitioners is a device for automatically frustrating price competition and is inherently collusive, oppressive and unfair" (Its Brief below, p. 45). Its contention in argument was that "the concurrent use of this pricing method is proof of the conspiracy charged" (R. 16792), that the term "basing point * * * has meaning only because it correctly implies that the place of actual shipment may not be the basing point" (R. 16798), and "that the system is illegal *per se*" (R. 16815).

Yet it now says that "the system as such was not attacked" but that "it is open to serious doubt whether a system so widely and consistently used and followed as Respondents' could be maintained in the absence of agreement. Had the Commission inferred agreement from the system alone, it might loosely be said that the system itself was attacked as illegal *per se*" (Brief, pp. 122-3).

It suggests that a combination may be implied "as matter of law" but says "whether or not this be so" the Commission could draw the inference that the Respondents "were acting pursuant to combination, agreement and implied understanding" (*id.* p. 54) and asserts that the Court below erroneously held that the order is defective for want of an explicit finding "that there was implied agreement or combination among Respondents to use the multiple basing point delivered price system and not to compete with each other in price" because the general findings and other findings of collective action "constitute adequate findings of such combination" (*id.* pp. 61-2).

Judge Major for the Court of Appeals exhaustively reviewed the findings (R. 16763-16785) and the Petitioner's arguments in support of its position that the concurrent use of the basing point system was illegal *per se* (R. 16785-16814). His unsurpassed patience, industry, discrimination and candor won the praise of the dissenting Judge (R. 16817).

The majority of the Court held that there was no finding of any actual agreement or conspiracy to restrain commerce by the use of the so-called multiple basing point delivered price system and that the concurrent use by the Respondents of their respective delivered prices determined by the use of basing points, as practiced by most of the industry, was not illegal *per se*, as the Petitioner contended.

That there is any such question of law in the case does not even appear from the petition, although one of the reasons assigned for granting the writ was that the Court of Appeals said that "the question or questions of law presented, ultimately and the sooner the better, must be decided by the Supreme Court."

The Court of Appeals actually said: "It"—the basing point system—"involves a question of law which, ultimately, and the sooner the better, must be decided by the Supreme Court". (R. 16785).

Yet the petition created the impression that the Court below thought that the case involved *questions* of law which ought to be authoritatively decided, and nowhere indicated that the precise question referred to by the Court of Appeals was whether the concurrent use of the basing point system is illegal *per se*.

The mass of involved, equivocal and inconsistent findings was plainly intended to support the basic contention, on which this proceeding was conducted both before the Examiner and the Court below.

The question is not included in the statement of the questions presented on pages 2-3 of the Petitioner's brief and is not argued in the brief.

SUMMARY OF ARGUMENT

I

An industry-wide conspiracy to use a particular pricing method is not within Section 5 of the Federal Trade Commission Act

It cannot be an unfair method of competition to sell at delivered prices determined by the use of basing points. A conspiracy to sell in that way is not a violation of the Federal Trade Commission Act. That Act does not confer jurisdiction on the Commission to enforce the Sherman Act and the Congress never intended that it should.

II

The Court will only consider the questions presented by the Petition

The Court of Appeals made two basic decisions: (1) that the Commission had not found that any of the Respondents had ever agreed, combined or conspired to use the so-called multiple basing point delivered price system, and (2) that it was not unlawful *per se* to use delivered prices determined by the use of basing points.

Neither of those questions was presented by the Petition and the second has now been abandoned.

III

Even if the question of the sufficiency of the Findings was presented by the Petition and was a question which this Court would take up on *certiorari*, it will not search 170 pages of equivocal and inconsistent findings of inferences and evidence to infer an intention of the Commission to make a finding of the essential ultimate fact not expressed

The Court will search the conglomerate mass of so-called findings in vain for a single finding that any of the Respondents, let alone all of them, ever agreed, combined or

conspired to use the so-called multiple basing point delivered price system. It will not supply a finding of the ultimate fact essential to sustain the order of an administrative tribunal whose findings are conclusive if supported by substantial evidence.

The omission of the essential finding was not inadvertent. 170 pages of findings of the type involved could not have been inadvertent. They were intended to show practices, claimed to be inherent in said system, and results claimed to be inevitably produced by its concurrent use. The purpose of that showing was to support its basic contention in the Court below that the concurrent use of the basing point system was inherently collusive and illegal *per se*.

It has now expressly abandoned that contention.

IV

Even if the Court were disposed to spell out the essential finding from a mass of involved, ambiguous and inconsistent findings and inferences, it would be unable to do so

The Petitioner relies on (a) so-called general findings, and (b) findings of specific practices by one or more of the Respondents.

None of the general findings can be construed as a finding of any agreement, combination or conspiracy to use any particular pricing method, let alone said system.

Few of the specific acts or practices of one or more of the Respondents have any more relation to one pricing method than another. Many of them were expressly held by this Court in the first *Cement* case to be legitimate objects of collective action and neither of them, nor all together, can possibly be construed as a finding of a conspiracy to use said system.

An analysis of the most important findings in the case

on which the Petitioner does not now rely will disclose that the omission of any finding of an actual agreement, combination or conspiracy to use said system was not inadvertent and that the findings were only intended to show (a) practices alleged to be inherent in the use of basing points and (b) results, notably identical prices, alleged to be inevitably produced by the concurrent use of said system.

V

There was no evidence to support a finding of the ultimate fact essential to support the order even if such a finding had been made

There being no such finding, that question is moot.

The Petitioner relies:

A. *On identical sealed bids to the Government*

This Respondent proved without dispute how each of its bids was determined and that there was no collaboration or even contact with any competitor respecting such bids. There is less likelihood of price concessions to the Government than to private parties, since Government bids are published.

Even collusive price fixing, if established, would not tend to prove a conspiracy to use a particular method, since there can be collusive price fixing as readily under one method as another.

B. *Particular practices of one or more of the Respondents and co-operative action through the Institute*

The latter were held to be legitimate subjects of collective action in the first *Cement* case. None of them and none of the acts or practices of particular Respondents has the slightest tendency to prove a conspiracy to use the so-called multiple basing point delivered price system.

C. *Collective action under N. I. R. A.*

Such action was abandoned when the statute was held to be unconstitutional. Even if such acts were unlawful, though done in co-operation with the Government under the authority of an Act of the Congress, they would not tend to prove a conspiracy originating upon the organization of the Institute in 1929 and continuing until the present day, or one originating in the dim and distant past.

D. *Unsupported hearsay statements and opinions of alleged conspiracies*

Such statements and opinions were not binding on any one but the author in the absence of any other evidence of the conspiracy and, of course, were not evidence of the conspiracy.

VI

There was no proof or finding of individual violations of Section 2(a) of the Clayton Act, and certainly none of a conspiracy to violate the Act

The third paragraph of the cease and desist order depends, not only on a conspiracy to violate the Act, but fundamentally upon proof and a finding of a conspiracy to use the multiple basing point delivered price system, since the Commission ruled out the defense authorized by Section 2(b) of the Act by a finding that the Respondents were precluded from asserting that defense by their combination to use said system.

There is no proof or finding of any discrimination between or among competing customers. The Petitioner admits as much by now contending that there may be a lessening of competition among sellers, but there certainly can be no lessening of competition among competing sellers merely by using the same pricing method as they use, and the Commission found that practically all cement manufacturers were members of the Institute and Respondents.

ARGUMENT

Point I

An industry-wide conspiracy to use a particular pricing method is not within Section 5 of the Federal Trade Commission Act

It may be assumed that such a conspiracy would violate the Sherman Act, but the Federal Trade Commission Act confers no general jurisdiction on the Federal Trade Commission to prohibit violations of the Sherman Act and the Congress never intended to confer any such broad jurisdiction on the Commission. That is shown both by the terms of the Act and by what was said in the Congress by its sponsors (51 Cong. Rec. 11083, 11528-9, 11532-3, 12623, 12787-8, 13301, 13312, 13156).

The Petitioner relies on three cases:

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441;
Id. v. *Keppel & Bro. Inc.*, 291 U. S. 304;
Fashion Originators Guild, Inc. v. *Federal Trade Commission*, 312 U. S. 457.

None of those cases held that the Commission had jurisdiction to enforce the Sherman Act. The last case cited involved an effort to so regulate an industry as "to exclude from the industry" non-conforming manufacturers and distributors, thus directly tending to create a monopoly. The Petitioner's argument was that the regulations complained of did not violate either the Sherman Act or the Clayton Act.

The other two cases involved restraints upon competitors and dealers. The first case was decided by a sharply divided Court, Justices Holmes, McKenna, Brandeis and McReynolds dissenting.

Of course, unfair methods of competition may violate the Sherman Act, but all violations of the Sherman Act are not unfair methods of competition.

The sale of goods at delivered prices determined by the use of basing points, the natural way to determine delivered prices, is not, and has never been held to be, an unfair method of competition.

It certainly cannot be unfair to competitors who sell in that way, whether they are in a conspiracy or not. It is not unfair to buyers who prefer delivered prices as is conceded, and who, as was both proved and found, will not pay a cent a barrel more for one brand of cement than another.

The Petitioner says that under this Court's interpretation of the Act it would seem that the Commission is empowered to prohibit practices regardless of whether or not the parties engaging in them "have combined or agreed so to do" (Brief, p. 40). Even so, it may prohibit them only if they amount to unfair competition. The cases relied on involved practices found to amount to unfair methods of competition.

Point II

This Court will only consider the "Questions Presented" by the Petition

Johnson v. *Manhattan Railway Co.*, 289 U. S. 479, 494;
General Talking Pictures Co. v. *Western Electric Co.*, 304 U. S. 175, 177-9;
Connecticut Ry. Co. v. *Palmer*, 305 U. S. 493;
Rorick v. *Devon Syndicate*, 307 U. S. 299.

Neither of the basic questions decided by the Court of Appeals was presented by the Petition. The question

whether the concurrent use of the basing point system is illegal *per se* has plainly been abandoned. The question whether the Commission found the ultimate fact of a conspiracy to use a particular pricing method, essential to support its order, is argued though not presented by the Petition and though each of the questions presented by the Petition can be decided without deciding that question.

Its omission from the questions presented was not inadvertent. Error was assigned to the ruling of the Court of Appeals, but a mere specification of error does not expand or add to the stated questions for review.

General Talking Pictures Co. v. *Western Electric Co.*, 304 U. S. 175, 177-8.

Point III

Even if the question of the sufficiency of the findings was presented by the Petition, and was a question on which this Court would take up a case on *certorari*, it will not search 170 pages of equivocal and inconsistent findings of inferences and evidence to infer an intention of the Commission to make a finding of the essential ultimate fact not expressed

What was said by Judge Cardozo, speaking for the entire Court in *U. S.* v. *Chicago M. St. P. & P. R. Co.* (294 U. S. 499, 505-511), applies with peculiar and even greater force to the findings in the instant case.

The like was never before encountered by any Court.

We say that the Commission never intended to find an actual agreement or conspiracy to use the multiple basing point delivered price system. It wrote 170 pages to show practices claimed to be inherent in the use of said system and results claimed to be inevitable from such use to support its contention that the concurrent use of the system was inherently collusive and illegal *per se*.

The Petitioner now argues that the agreement or conspiracy enjoined is to be inferred or implied from the findings. It persists in calling it a conspiracy to prevent price competition and to use said system.

But this Court, in reviewing the decisions of administrative tribunals whose findings are conclusive if supported by substantial evidence, cannot infer findings not expressed. It was for the Commission to draw the ultimate conclusion of fact essential to support its order, but it did not do so unless it was right in contending that the concurrent use of the basing point system was inherently collusive and illegal *per se*.

Phelps Dodge Corp. v. *N. L. R. B.*, 313 U. S. 177, 196-7;
Securities & Exchange Commission v. *Chenery Corp.*, 318 U. S. 80, 94-5;
Id.; No. 81 and 82, October Term 1946, decided June 23, 1947.

The Commission raked over the history of the cement industry since the turn of the century. It was aided by the investigation of the Department of Justice and the evidence in the first *Cement* case. During a three-years' trial it introduced all the evidence it could discover of any dubious or questionable conduct by any cement manufacturer or manufacturers separately or in concert.

It did not omit any finding it intended to make by inadvertence. It has simply shifted its ground and now relies on an implied agreement. But the inference had to be drawn by the Commission itself and will not be supplied by this Court.

Point IV

Even if the Court were disposed to spell out the essential finding of conspiracy from a mass of involved, ambiguous and inconsistent findings and inferences, it would be unable to do so

There is no pretense that there is any such finding in express words. But if the Commission relied on an actual agreement it is inconceivable that it would not have found one after taking evidence for three years unless it thought it could not sustain such a finding.

The Petitioner admits that there is no explicit finding of what it calls an "implied agreement or combination among Respondents to use the multiple basing point delivered price system and," it adds, "not to compete with each other in price."

But it says that "general findings" and findings "that Respondents collectively undertook to prevent competition in price among themselves and to promote and maintain the perfect functioning and general use of the multiple basing point delivered price system" suffices (Brief, pp. 61-62).

1. *The General Findings*

The only general findings referred to are the conclusion (R. 16132), Paragraph 26, (R. 16131), Paragraph 24 (R. 16127), Paragraph 7(o), (R. 16000) and Paragraph 1(a)-(d) (R. 15962-3).

Paragraph 26 and the final conclusion merely state the conclusion of the Commission that "the capacity, tendency, and effect of the combination maintained by the Respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said Respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition . . ." and that "The aforesaid combination and acts and practices of Respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and

circumstances set forth, constitute unfair methods of competition * * * and the discriminations in price by Respondents, as hereinabove set out, constitute violations of" the Clayton Act.

The Petitioner is indeed hard pressed to contend that those conclusions of a restraint of competition and a violation of the Federal Trade Commission Act and the Clayton Act from the combination "in the manner aforesaid" and "as hereinabove found" amount to a finding of an agreement, combination or conspiracy to use the "multiple basing point delivered price system."

Paragraph 24 deals exclusively with the alleged violation of Section 2(a) of the Clayton Act charged in Count II of the complaint. No one would suppose that it was intended to support the charge in Count I.

It found that price discrimination "is the result of respondents' combination to use the multiple basing point delivered price system" and that "the use of the multiple basing point delivered price system by the respondents" precludes the defense authorized by Section 2(b) of the Act.

Those are not findings that the respondents, or any of them, ever agreed, combined or conspired to use said system. They presuppose an earlier finding, or findings, defining the combination referred to. For all that appears that combination resulted, not from agreement, but simply from the concurrent use by many of an unlawful pricing method as in the *Interstate Circuit case* (306 U. S. 208) relied on by the Petitioner.

If there had been a single finding that any of the respondents had ever agreed, combined or conspired to use said system, the Court would most certainly have been informed of it, and the Petitioner would not have had to resort to findings which presuppose earlier explicit findings, of which it admits there were none.

Even if the equivocal, contradictory and illogical nature of the earlier findings be disregarded, they were plainly

intended at the most to support the claim that the pricing method, or so-called system, in most general use is illegal *per se*. Paragraphs 24, 26 and the final conclusion can only be deemed to have referred to a combination resulting from the concurrent use of an illegal method or system.

But the Petitioner has expressly abandoned any such claim. It says that the Court below erred in thinking that the multiple basing point delivered price system was attacked as illegal *per se*, and that "The system as such was not attacked" (p. 122).

It seems to have some doubt of the wisdom of abandoning its basic contention below, for it poses the question as a preliminary point "whether the system of pricing cement used by respondent producers in fact eliminates price competition among them, irrespective of whether or not there is combination or implied agreement on their part not to compete in price and to use this pricing system" (pp. 37-38). Under B (p. 42) it attempts to make out that there is no price competition among the respondents under the method of determining prices in use, although this Court said in the first *Cement* case (268 U. S. 599) that that method "is a necessary procedure in competing in the sale of cement".

It says under that point that the seventh finding, that the formula in use "inevitably results" in identical prices, is not "seriously questioned" and it does refer, but only incidentally, to the non-base mill.

However, that finding has ceased to be the "heart of the case". It is not claimed that it is a finding of any agreement, combination or conspiracy, and we show *infra* (pp. 30-33) that the formula found is entirely fictitious.

It is no longer claimed that the non-base mill is an indispensable part of said system and that the systematic calculation of delivered prices from places other than those of actual shipment is the essence of said system. That

was the heart of its contention, as the seventh finding was the heart of its case, below.

Paragraph 1(a)-(d) is a finding of the organization of the Institute, that all producers of cement are members, and that the individual Respondents are its officers.

Paragraph 7(o) is a finding that the Institute was organized to maintain the "multiple basing point delivered price system."

That not only shows how hard pressed the Petitioner is to make out a finding of the conspiracy enjoined, but also illustrates its characteristic method of drawing inferences from wholly inadequate premises.

The finding is admittedly an inference from the fact that one of the stated purposes of the Institute in its Articles of Association was "To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable."

The conclusion found is an obvious *non-sequitur*.

As shown *ante* pages 10-11, the Institute was organized in August, 1929, at the suggestion of the Chairman of the Commission to propose a Code of Ethics preparatory to a trade practice conference at the very time when the Commission became active in promoting such conferences, but owing to a difference of opinion as to policy between the Commission and the Department of Justice the proposed trade practice conference was indefinitely postponed, the Code of Ethics never became effective, the Commission found that it was abandoned at the time of N. I. R. A., and the Institute remained inactive until it was revived by a sufficient increase in its membership to make it representative of the industry, which increase was induced solely for the purpose of cooperating with the Government in the administration of N. I. R. A., and in the meantime price concessions were wide-spread throughout the industry, as the Court found (Finding 6(c), R. 15987).

Neither the Articles of Association nor said Code of Ethics as much as mentioned the multiple basing point delivered price system.

The term "trade customs and usages" obviously meant such trade customs and usages as were appropriate for trade practice conferences.

The rules of the Commission provide that the trade practice procedure has for its purpose the establishment of "trade practice rules" and "standards of ethical business."

> Rule 28, F. T. C. Rules of Practice, (16 CFR, Cum. Supp. § 2.28, as amended by 12 F. R. 5449).

No one ever supposed that the maintenance of a particular pricing method was an appropriate subject for trade practice conferences.

The inference drawn from the recital of purposes in the Articles of Association was plainly unwarranted and the ultimate conclusion of a conspiracy to use said system was not even drawn.

The general findings now relied on do not even approximate a finding of any agreement or conspiracy to use said pricing system.

2. The Findings of Collective Action to prevent Competition and to promote and maintain the Multiple Basing Point Delivered Price System

The argument under this head is characteristic of the logic displayed throughout the findings.

The premises are (a) a pricing formula known to all and in common use, automatically and inevitably resulting in identical prices and not requiring renewed understandings or agreements, (b) special circumstances or conditions in which the formula fails to achieve complete and absolute uniformity of price.

The conclusion is that, if the Commission found "that Respondents collectively undertook to regulate, control or stamp out such practices as might lead to price competition

among them or to the impairment of price uniformity called for by their pricing formula," that constituted a finding "that Respondents combined and agreed to restrain competition in price and to use and to maintain their pricing formula" (Brief, p. 66).

The last quoted words show that the Petitioner knows how easily and simply it could have expressed a finding of the ultimate fact necessary to sustain its order if there had been any evidence to support such a finding. There is no pretense that it said anything remotely resembling those words in the whole 170 pages of so-called findings.

The argument last above referred to exposes the Petitioner's illogical method of drawing unwarranted inferences.

The simple mathematical formula, A plus B equals X, or price base plus freight equals delivered price, is the natural and historic formula to determine delivered prices, and is the only formula used by the Respondents. The first manufacturer to sell cement at delivered prices in this country used it as the Commission found (Finding 7(h), R. 15992). Of course, it did not require renewed understandings or agreements. Nor did it require an initial agreement. None was found and there was none.

Since the known terms vary at different basing points, its use cannot possibly result in identical prices. As will presently be seen, the Petitioner relies on a fictitious formula, but no formula will inevitably result in identical prices in the absence of an agreement to use it, as premise (b) above admits.

Practices to prevent competition or the impairment of price uniformity are certainly not the same as an agreement and conspiracy to use a particular pricing system.

To give its syllogism verisimilitude, the Petitioner repeats its constantly iterated assertion that the conspiracy enjoined was to restrain competition and to use said pricing system.

The practices shown by findings which are said to constitute a finding of the conspiracy charged are (a) the compilation from the published tariffs and distribution by the Institute of freight books, (b) sales f.o.b. mill and land grant rates, (c) involuntary or punitive bases, (d) preventing truck transportation, (e) preventing diversions in transit, (f) standard terms of sale, (g) classification of dealer business, and (h) boycott of dealers handling imported cement.

(a), (e) and (f) were held by this Court in the first *Cement* case to be legitimate subjects of co-operative action. It also held that standard forms of "specific job contracts," the checking of such contracts, and the exchange of statistical information on production, shipments and stock on hand were legitimate subjects of co-operative action (268 U. S. 588, 591-600).

(a), (b) and (c) are the only ones having any relation to the use of basing points. The ascertainment of special land grant rates is but a supplement to the ascertainment of regular rail rates, and (c) involves an individual practice that few, if any, ever engaged in and if at all only spradically. The Petitioner asserts here as it did below that the punitive base is inherent in the use of the basing point system. That is disproved by the fact that so few of the Respondents ever indulge in the practice. There may be evil practices in the use of any pricing method. They are not for that reason inherent in the method. (d) has no relation to the use of basing points. Different Respondents in different localities did at one time co-operate with the railroads to prevent trucking. If that was unlawful, they could have been prosecuted for it. (g) has no relation to the use of any particular pricing method. The classification and definition of dealers would be as useful under one method of selling as another and irrespective of the number of methods in use. (h) If some engaged in an unlawful boycott, there was a remedy for it.

None of the above practices tends in the slightest to prove a conspiracy to use a particular pricing method. A finding that there were such practices is certainly not a finding of a conspiracy to use a particular pricing method.

The Petitioner relies on *U. S.* v. *Bausch*, 321 U. S. 707, *U. S.* v. *Masonite Corp.*, 316 U. S. 265, and *Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208.

Those cases all involved direct participation in unlawful methods, which would have been unnatural in the absence of some agreement, understanding, or conspiracy.

The foregoing disposes of every finding now relied on by the Petitioner as even approximating a finding of the ultimate fact essential to sustain the cease and desist order, namely, that any of the Respondents, to say nothing of all of them, ever agreed, combined or conspired to use the so-called multiple basing point delivered price system.

We ask the Court especially to note that the order only enjoins a conspiracy to use a particular pricing method. It does not enjoin a conspiracy to prevent competition or to restrain commerce, as the Petitioner reiterates throughout its brief.

It may be assumed that a conspiracy to use a particular pricing method would be unlawful, however lawful the method in and of itself might be. It may also be assumed that the concurrent use of a method, which is illegal *per se*, may be sufficient to establish an unlawful combination or conspiracy.

The Petitioner did not find the former and it has expressly abandoned its claim that the concurrent use of a basing point system is illegal *per se*.

That disposes of this case.

There was no intention to find an actual agreement or conspiracy

A brief analysis of some of the findings, to which the Petitioner now pays scant attention, or none at all, may serve to show that the Petitioner deliberately wrote 170

pages of so-called findings to support the theory, now abandoned, on which it tried this case and argued it below, and that it never intended to find any agreement, combination, or conspiracy to use the multiple basing point delivered price system.

170 pages of such findings could not have been inadvertent.

The findings show that instead of a common pricing method being used throughout the cement industry, several quite different methods are in use (*ante* pages 5-6), and that the natural method of determining delivered prices was initiated in the cement industry by individual action and that its use was extended by like action (*ante* pages 8-9), thus confirming the decision of this Court in *Cement Mfgrs. Prot. Ass'n* v. *U. S.*, 268 U. S. 588, that its use had developed naturally, and not as the result of co-operative action, and had become general in the cement industry before the organization of said Association in 1916.

The Court of Appeals said that the seventh finding was the heart of the Commission's case. The Petitioner does not claim that that is a finding of any agreement or conspiracy to use said system. It does refer to the fictitious formula found in Paragraph 7(a) and to Finding 7(h) that "this pricing formula * * * will inevitably result in identical delivered prices," though it found that "from time to time numerous concessions have been made in particular areas" and that such concessions were widespread in the early 1930s, right after the organization of the Institute (Paragraph 6(c), R. 15987).

Its finding of the fictitious formula that "the delivered price at any location shall be the lowest combination of base price plus all-rail freight" was a palpably erroneous inference.

It now describes that formula as one "which designated the price leader for any and every point in the United States and provided all others should adopt as their own the price of the price leader" (Brief, p. 39). It says, "In

effect, there is for every locality an ascertained price leader. Since the formula serves to identify, as to any particular place, both the price leader and his price * * *" (*id.* p. 43).

That is descriptive of an agreement, not a formula.

The finding of numerous concessions from time to time and of wide-spread concessions during the early 1930s, without a suggestion that such concessions violated any agreement, express or implied, disproves both the existence of any such agreement and the use of any such formula, which of course does not admit of concessions but works automatically, if at all.

The argument now advanced likewise disproves the use of any such formula. It says that no matter how "better-perfect" it may be, "there are likely to be special circumstances or conditions in which the formula fails to achieve complete and absolute uniformity in price" (*id.* p. 66), although if the Respondents did use the formula described it would always and inevitably result in identical delivered prices. The only thing that could prevent that would be the fact that the so-called formula is purely fictitious. There is no such formula. Prices are not identical. There are numerous, and at times even wide-spread, price concessions.

The only special circumstance or condition is that there is no such formula in use, and Respondents in the independent exercise of will decide whether to meet or to undersell the lower price of the competitor nearest destination and on numerous occasions undersell that price, as the findings say.

The Petitioner asserts that the Respondents meet those special circumstances and conditions by stamping out "such practices as might lead to price competition among them or to impairment of the price uniformity called for by their pricing formula" and that "this constituted a finding by the Commission that Respondents combined and agreed to restrain competition in price and to use and maintain their pricing formula" (*id.* p. 66).

That is at once an admission that there is no such finding and that the so-called formula is fictitious.

The low combination of price base plus freight at any locality does establish the maximum price at which anyone can sell cement there, since buyers will not pay a cent a barrel more for one brand than another.

Other sellers may follow one of three courses: (a) They may withdraw from that market if said maximum is lower than they care to meet; (b) they can lower their own delivered price there to meet that maximum as Section 2(b) of the Clayton Act authorizes, or (c) they may undersell that maximum and set another maximum at which anyone can sell cement there.

Price-cutting under those circumstances invites retaliation and may start a price war. It is the part of prudence and sound business judgment under those circumstances to meet but not to undersell the price of the competitor who has the freight advantage.

On numerous occasions the desire to fill order books gets the better of sound sense and prudence, but generally the price of the seller having the freight advantage will be met, not undersold.

The Respondents frankly admitted that they generally pursue the policy of meeting but do not attempt to undersell the lower prices of competitors having freight advantages in any area and that as a result the delivered price at any locality was generally the lowest combination of price base plus freight.

That is the sole basis for the finding of the use of said formula. It is obvious that the finding is an inference from that fact alone. It is an obvious *non-sequitur*, but it is typical of the Petitioner's inferences and of its arguments throughout its brief.

This Court found in the first *Cement* case that the delivered price at each locality was generally the lowest combination of price base plus freight (268 U. S. 588, 597-9).

That fact frankly admitted by the Respondents results

from the fact that they generally use the good sense and business judgment to meet but not to attempt to undersell the delivered price of the nearest mill. It does not result from the use of a formula that the delivered price of each at any location *shall be* the lowest combination of base price plus freight.

Each seller, having only base mills, has its own delivered price at each location where it sells, determined by the simple mathematical formula price base plus freight. The formula having the lowest terms, namely, that of the nearest mill, sets a maximum at which any cement can be sold at any location since buyers will not pay a cent a barrel more.

The other sellers must ascertain what that price is to know how much they must lower their own delivered prices respectively to meet, or if they are foolish enough to make the attempt, to undersell that price.

The Commission found that they learn their competitors' delivered prices almost immediately from common customers or salesmen in the field (Finding 9(e), R. 16029). All they have to do then is to lower their own delivered prices accordingly. They need no formula to do that.

If they do not happen thus to ascertain the delivered price of the mill nearest to a particular location, they can readily ascertain its price base at the point of shipment by deducting the freight from some known delivered price at some other destination. Thus having ascertained the price base, it is a simple matter to add the freight to the particular destination where the delivered price does not happen to be known. Those simple calculations would all be made according to the formula A plus B equals X, using the ascertained terms of the competitor, their sole purpose being to ascertain the delivered price which has at least to be met to make a sale.

The finding that the formula used is that the delivered price shall be the lowest combination is pure fiction. Even if the nearest mill sold f.o.b. mill, competitors would have

to add the freight to that mill price to ascertain the delivered cost to the buyer which they would have to meet. That is what this Court said in the first *Cement* case (*id.* 599) "is a necessary procedure in competing in the sale of cement."

> "The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination * * *."
>
> *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708, and see *U. S.* v. *Standard Oil Co.*, 47 F. 2d 288 and cases cited at pp. 316-17.

Section 2(b) of the Clayton Act makes it a defense to a charge of discrimination to show a good-faith lowering of price to meet the equally low price of a competitor and it has been held that underselling the lower price of a competitor deprives the seller of that defense.

Moss v. *Federal Trade Commission*, 148 F. 2d 378.

The fact that cement manufacturers generally do not take that risk or the risk of inviting retaliation and possibly a price war, such as occurred in the cement industry in the early 1930s, does not justify the inference that they use a formula which the Petitioner did not venture to find was an agreement but which would have to be an agreement to be effective.

This Respondent and most of the Respondents have only base mills and usually sell at delivered prices determined by adding the actual freight to the price base established at the mill from which shipment is made.

Thus they have their own respective delivered prices at each destination point, where they sell, determined in that manner, and, when they go into territory where competitors have freight advantages and thus a lower delivered

price, they usually lower their own delivered prices to meet the equally low prices of a competitor, precisely as the statute expressly authorizes them to do.

It is of no consequence how they ascertain the price they have to meet. In fact the Commission found that except during the N. I. R. A. period and a short period thereafter "there has been no systematic exchange among the corporate respondents of basing point prices or changes in such prices" and that they learned their competitors' delivered prices almost immediately from common customers and salesmen in the field (Finding 9(e), R. 16029).

The Petitioner now does not claim that either Finding Six or Finding Seven is a finding of any agreement to use the multiple basing-point delivered price system, although both say that unnamed practices and customs, and the existence and extension of said fictitious formula resulted from understandings and agreements, without saying what, when or how, or between whom.

But Finding 7(h) says that "this formula, once put into operation, is self-perpetuating in the sense that renewed understandings or agreements are not needed to maintain identical delivered prices" (R. 15991). Yet the evidentiary finding in the immediate context shows that the only real and natural formula to use, price-base plus freight, was first used in the cement industry by a single company (R. 15992) and, of course, that formula had been used ever since sales of any product have been made at delivered prices.

The Petitioner does not include Findings 7(a) and (h) among the findings on which it says the conclusion in Finding 26 and the final conclusion are based, namely, that the combination maintained "in the manner aforesaid" and "as hereinabove found" restrains competition, is an unfair method of competition, and violates Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act.

It nowhere says that the finding that the formula in use, that the delivered price at any locality shall be the lowest combination of price base and freight, is a finding of an agreement, combination or conspiracy to use the multiple basing point delivered price system.

Manifestly, that finding, the heart of the Commission's case as the Court below well said, was only intended to support the basic contention that the said system is illegal *per se*. Since the Petitioner has now abandoned that basic contention, it has also abandoned its heart.

It would unduly prolong this brief to discuss the less important findings in detail. Suffice it to say that they confirm the conclusion to be drawn from Finding Seven, the most important of all.

The Non-base Mill

The non-base mill, the calculation of delivered prices from places other than those of actual shipment, was the heart of Petitioner's contention below as Finding 7 is the heart of the case. Not so much is made of the non-base mill since the Petitioner has abandoned its contention of illegality *per se*.

But it argued below that the "concurrent use of this pricing method is proof of the conspiracy charged" (R. 16792). The term basing point "has meaning only because it correctly implies that the place of actual shipment may not be the basing point" (R. 16798). "It is the method of pricing by formula that produces the identity of delivered price quotations" (R. 16799). The "system includes the systematic imposition of phantom freight as in the *Pittsburgh Plus* and *Glucose* cases" (*id.*) "The base price of course is announced by the base mills. Unless these mills are recognized as price leaders and their base prices accepted, adopted, and woven into the price structure by their competitors, there can be no basing point system" (R. 16801). Quite true! There can be and is no such system as the Petitioner envisages.

It stands established that most of the Respondents have only base mills and calculate their respective delivered prices only from the places of actual shipment.

There is no claim and no finding of any agreement on basing points or on which mills shall be base and which non-base mills, and the Petitioner found that each management decided for reasons which it "considers sufficient" whether its mill or mills shall be base or non-base (Finding 7(b), R. 15,989).

Price Uniformity

The Petitioner relies on a so-called system which, it says, inevitably results in "identical prices." But there is bound to be general price uniformity of cement in each locality, irrespective of what or how many pricing methods are used, because cement is a highly standardized product and as the Petitioner both alleged and found, and the undisputed evidence shows, cement buyers will not pay as much as a cent a barrel more for one brand of cement than another.

The Petitioner itself found that it is a "recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized article sold to well-informed buyers," but that that principle did not apply to cement because cement prices "are not the result of market action in the true economic sense but merely expressions of a non-competitive or monopolistic price structure" (Finding 22(c), R. 16123-4). More words!

This Court found in the first *Cement* case that generally the price of cement at any destination was the lowest combination of base price plus rail freight to that destination and plus the charge for bags and that price uniformity did not justify an inference of collusive or concerted action (268 U. S. 588, 597-99, 605-6).

The Petitioner does not ask the Court to overrule that decision, which was made in one of a group of actions against practically all the members of the industry joined in one proceeding here. It distinguishes it on the ground

that "the Government did not either charge or rely upon agreement or understanding among the defendants for price maintenance or price uniformity" (Brief, p. 40).

The fact is that the complaint in that case did charge a combination and conspiracy (see Paragraph V of the complaint), but the Government had to abandon that contention for want of proof and to rely on illegality *per se*, precisely as was done by the Petitioner below.

The Petitioner seeks to make it appear that the gist of this case is a conspiracy to prevent price competition and to maintain price uniformity, but the cease and desist order only restrains a conspiracy to use the multiple basing point delivered price system.

The facts disclosed in that case did not differ materially from those involved in the instant case. This Court squarely held that the use of basing points to determine delivered prices was not the result of collective action but was rather the result of the natural development of the business, that most of the practices relied on here to show a conspiracy to use the basing point system were legitimate subjects of co-operative action and that price uniformity did not justify an inference of collusion.

Cases so closely parallel are rare.

We respectfully submit that the conclusion is inescapable that the Petitioner did not find and did not intend to find that any of the Respondents ever actually entered into any agreement, combination or conspiracy to use any particular pricing method but instead it relied wholly on the concurrent use of a method which it claimed and sought to show was illegal *per se*. The findings are otherwise inexplicable.

Thus the other questions raised are moot.

Point V

There was no evidence to support a finding of the ultimate fact essential to support the order even if such a finding had been made

We insist that whether there was evidence to sustain a finding not made is a moot question. This Court cannot make findings for an administrative tribunal.

There is no pretense of any direct evidence. The Petitioner maintains that implied agreement was shown, from which it no doubt means that facts were shown from which an agreement could be implied, but the Commission did not find the ultimate fact.

Of course, a conspiracy can and usually has to be inferred from conduct, but the conduct must be such as would not naturally occur in the absence of a conspiracy and it must tend to show the particular conspiracy in question.

A. *Uniformity of sealed bids*

The Petitioner now maintains that identical sealed bids to Government Agencies prove the conspiracy to use the multiple basing point delivered price system, "even if all other proof were lacking."

But since such bids soon become public, there is less likelihood of price concessions to the Government than to private buyers since the published bids would set a maximum price at which any cement could be sold.

If there were collusion in the submission of such bids, it would not matter what or how many pricing methods were used by the bidders, for there could be collusive bidding under one pricing method as well as another or under different methods.

Collusive bidding is an offense for which the bidders could be prosecuted but it does not prove or tend to prove a conspiracy to use a particular pricing method.

This Respondent stands ready to meet any such charge. Indeed, it disproved the charge in the instant case. Until

stopped by the Examiner, it proved by its responsible officials just how each bid was determined and that in each instance it acted individually without consultation, agreement, or even contact with any competitor (R. 10664-94). The Examiner finally rejected further proof as unnecessary on the condition that the Respondent should be protected to the same extent as if further proof had been allowed with respect to each bid (R. 10691-94).

The Petitioner made much of identical bids carried out to several decimal places, which it said could not have been a coincidence. But there was a simple explanation of the coincidence, since land grant-freight rates are carried out to several decimal places and to give the Goverment the full protection of its special rate, the bids naturally had to be carried out correspondingly.

B. *The findings respecting particular practices*

They have already been considered. The Petitioner is so hard pressed that it even contends that they are findings of the particular conspiracy enjoined.

As already shown, none of them tends in the slightest to prove a conspiracy to use a particular pricing method.

C. *Acts and practices under N. I. R. A.*

If such acts were unlawful, perhaps the participants, including the Government officials, could have been prosecuted for them, although they were done in co-operation with the Government pursuant to an Act of the Congress.

Concededly, they were abandoned when the Act was held to be unconstitutional. The *oil* cases (*United States v. Socony Vacuum Oil Co., et al,* 310 U. S. 150) relied on by the Petitioner are certainly not authority for the proposition that they are evidence of a conspiracy initiated by the organization of the Institute in 1929 and continued to the present day, or of a conspiracy, which, according to the theory on which the case was tried, originated in the dim and distant past.

D. *The Trainor Letter*

We deem it unnecessary to cite authorities to this Court that the declarations and opinions of an alleged conspirator are not binding on anyone else without proof of the conspiracy and that they are not evidence thereof.

E. *Conclusion*

The question considered under this point was presented by the Petition for Certiorari on the assumption that there was a finding of the ultimate fact essential to sustain the cease and desist order.

Even if it were not moot as we contend, the manifest insufficiency of the evidence on which the Petitioner now relies to establish any conspiracy to use the so-called multiple basing point-delivered price system strongly confirms the conclusion, plainly to be drawn from the findings as above, that the Petitioner never intended to find any agreement or conspiracy to use any particular pricing method, except as one was to be inferred from the concurrent use of an illegal system.

Having for reasons best known to itself abandoned that contention, the Petitioner was perforce compelled to resort to the claim of an actual agreement, combination or conspiracy to use said system.

Perhaps it concluded that that was the easier contention to maintain. That it had doubts even of its changed position is manifested by the fact that throughout its brief it couples the conspiracy enjoined by the cease and desist order with quite a different conspiracy, namely, one to prevent price competition and to restrain trade and commerce, and asserts that the Commission was warranted in finding an implied agreement, which in fact it did not find.

Point VI

There was no proof or finding of individual violations of Section 2(a) of the Clayton Act, certainly none of a conspiracy to violate the Act

That question is also moot for it depends on proof and a finding of a conspiracy to use the multiple basing point delivered price system.

Section 2(b) of the Act makes it a defense to a charge of price discrimination to show a lowering of price in good faith to meet the equally low price of a competitor.

But the Petitioner ruled out that defense by finding that the Respondents were precluded from using it by their combination to use the multiple basing point delivered price system (Finding 24(d), R. 1612[illegible]9), and it now says that "it is plain that under this order there is a violation of its provisions only in the event that there is a 'planned common course of action, understanding, agreement, combination, or conspiracy' to which a Respondent is a party to do something specified in the numbered paragraphs of the order" (Brief, pp. 121-2).

The Petitioner has now abandoned even its claim of a conspiracy to violate the Clayton Act, which its order enjoins.

It said in its petition for certiorari that the order should be sustained as to the non-base mills because they collected "phantom freight" and as to the base mills if this Court decided that so-called "freight absorption" was unlawful.

In its brief on the point it nowhere relies on conspiracy but depends on the *Corn Products* and *Staley* cases, which were both cases of individual violations.

But it failed to prove any individual violations and has apparently abandoned its claim that what it calls freight absorption is illegal. It even admits that the order does not forbid freight absorption (Brief, p. 124).

It neither proved nor found any discrimination between

or among customers. But this Court decided in the *Glucose* cases that such proof was necessary. It was supplied in those cases by the nature of the product, which is used in the manufacture of candy sold in competitive territory remote from the place of manufacture.

As is admitted and indeed found cement is a heavy product used in permanent structures at or near the place of delivery. The Petitioner admits, indeed asserts, that buyers in each locality are all treated alike. It asserts that there is discrimination among buyers differently located. But it tendered no evidence to prove and did not find that such buyers were competitors.

It seeks to avoid that fatal defect by asserting that there may be a lessening of competition among sellers as well as buyers.

But it offered no evidence to show any such lessening of competition, unless it claims that meeting the lower prices of competitors lessens competition among them within the meaning of the Clayton Act.

A failure to meet a competitor's lower prices certainly would not strengthen competition. A lowering of price to meet an equally low price of a competitor, precisely as authorized by Section 2(b) of the Act, cannot be a price discrimination within the meaning of Section 2(a), as the Petitioner supposes, even though identical price results.

If there have been individual violations of Section 2(a) of the Clayton Act they are to be prohibited as was done in the *Glucose* cases, not in a conspiracy suit.

"Mill net prices" and "freight absorption"

Since the Petitioner has created so much misunderstanding over the terms of its own coinage, "mill net prices" and "freight absorption", a word of clarification may be in order.

Both are improper and intentionally misleading terms, though the Petitioner did find as stated that "mill net" is "price".

It tried to get its definition of price into the Robinson-Patman Act, though it was stricken out of the bill as originally introduced because it would prohibit delivered prices (80 Cong. Rec., 7760, 8113, 8240, 8224).

We do not suggest that that action was an approval of the use of basing points to determine delivered prices, the fair, practical and natural way to determine them. But it was certainly a rejection by the Congress of the Petitioner's definition of price, just as the Congress has repeatedly rejected the Petitioner's recommendation that it prohibit delivered prices.

The Petitioner's brief on this point reiterates the arguments which it has been making for a quarter of a century for requiring uniform f.o.b. mill prices.

Price is what the seller charges and the buyer pays. When a sale is made at a delivered price, the buyer has no interest whatever in "mill net." That has significance only to the seller. When a seller's own delivered price is lowered to meet the equally low price of a competitor, it simply lowers the price at which it would otherwise sell in order to meet competition and to sell at all in a particular area.

That is not a question of ethics or economics, but is a question of the right of buyer and seller to contract on such terms, not unlawful as suits them both.

The fallacy, which the Petitioner has long promoted, that it is unfair to the nearby customer for the seller to realize more net from sales to him than to more remote customers has been exploded many times, but is still persisted in. The third paragraph of the order and the argument in the brief prove that this is but another attempt of the Petitioner to require uniform f.o.b. mill prices.

But the industries of the country, especially the heavy industries, have been developed, plants have been located, and communities have grown up adjacent to them, in reliance on the right to sell products by the historic method. No one can foresee the dislocations that would result from a change to uniform f.o.b. mill selling. Certainly the com-

panies having the widest distribution of plants would suffer the least.

The supposed unfairness to the nearby customer is a myth. Plants in the heavy industries have to be located with reference to the accessibility of raw materials. To secure volume and thus reduce the unit cost of production, they have to go afield and sell in areas where competitors have lower delivered costs. It does not harm the nearby customer for the seller to meet lower delivered prices at more distant points and thus secure the volume necessary to low unit costs of production. It pays less than it would otherwise have to pay, and less than the more remote customer pays unless the latter happens to be located as near, or nearer, to a supplier.

The requirement of uniform f.o.b. mill prices would erect an impassable barrier around each mill or group of mills and create a monopoly within it.

Lowering a delivered price to meet the equally low delivered price of a competitor is called freight absorption, and the term has become current through its persistent misuse by the Petitioner.

A delivered price fairly computed is a composite of all costs, including assembly as well as delivery costs, and a profit. When that price is lowered to meet a lower price, precisely as the statute authorizes, no one element of it is absorbed more than another. Indeed there is no absorption of anything but merely a lowering of price.

The Petitioner says that the non-base mill does not have true prices. The difficulty encountered by the *Staley Company* was that it did not have what the Petitioner calls a true price to lower to meet the equally low price of its competitor. But the base mills, which are the only kind of mills operated by this Respondent and most of the other Respondents, do have true delivered prices at every location where they respectively sell, namely, the sum of the price base at the mill plus actual freight.

It makes no difference what the lowering of that price to meet the equally low price of a competitor be called, unless cases be decided on terminology:

The Petitioner's concluding point (pp. 120-128) is an obvious effort to make the cease and desist order appear as harmless as possible and to qualify without actually abandoning its long campaign against delivered price selling and for the substitution of "uniform mill net prices".

Conclusion

We respectfully submit that this long litigation should be ended by the affirmance of one of the most thoroughly considered and conscientious decisions ever rendered.

Respectfully submitted,

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